ORIGINAL

No. 83-1990

Supreme Court, U.S.
FILED
JUL 10 1984
ALEXANDER L. STEVAS
CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1983

WILLIAM L. LUKHARD, Commissioner of the Virginia Department of Social Services; JAMES B. KENLEY, Commissioner of the Virginia Department of Health; and BRUCE U. KOZLOWSKI, Director of the Virginia Medical Assistance Program,

Petitioners

v.

EVELYN RANDALL, EMMA MATTHEWS, ARCHIE KYLE MORSE, MINNIE MILLER, WILLIAM E. SMITH, by his next friend, JUDY SMITH, POMPEY and RACHEL WINGO, and MAGGIE LAMB,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals for the Fourth Circuit err when it held that the Virginia Medicaid Program's "transfer-of-assets" eligibility rule in effect prior to July 1, 1981, was illegal because it violated 42 U.S.C. Section 1396a(a)(17)(B) and its implementing regulations?

2. Did the Court of Appeals for the Fourth Circuit err when it affirmed the District Court's order which, in addition to providing prospective injunctive relief, required the Virginia Medicaid Program to (a) identify class members, (b) notify them that the transfer rule had been declared invalid, and (c) apprise them of the existence of state administrative and judicial procedures by which they might obtain a determination of eligibility for past benefits?

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I. STATEMENT OF THE CASE

On April 24, 1980, Plaintiffs (now Respondents) filed this suit *in forma pauperis* on behalf of themselves and all other aged, blind, or disabled residents of Virginia who were similarly situated. They named as the Defendants (now Petitioners) the state officials who administer the Virginia Medicaid program.

At issue was the program's "transfer of assets" rule. This rule provided that an aged, blind, or disabled applicant for or recipient of Medicaid would be ineligible to receive benefits for one year if, within the preceding year, he had transferred or otherwise disposed of real or personal property to become or remain eligible for Medicaid or SSI benefits. The Respondents were persons who had, at one time or another, been disqualified from Medicaid on the basis of this.

Most of the Respondents were persons who, in their old age, were faced with a terrible choice. They had planned for years to bequeath their home or heirship property to their children, but for various reasons had not done so earlier. Had they done so, there would have been no Medicaid eligibility problem. Now they were told by Welfare Department officials that if they kept the property, they would be ineligible for their only source of income, SSI, because of "excess resources"; if they transferred the property to their children, they would lose their Medicaid benefits. Out of necessity they chose the latter course of action, and were declared ineligible for Medicaid for a year.

Suing under 42 U.S.C. Section 1983, Respondents sought a temporary restraining order preventing the Petitioners from disqualifying the named Respondents from Medicaid coverage; class certification; a declaratory judgment that the rule was illegal; temporary and permanent injunctive relief preventing the Petitioners from disqualifying class members from Medicaid coverage on the basis of the rule; notice to class members of

their right to reapply for assistance and possible reimbursement; and reasonable attorney's fees under 42 U.S.C. Section 1988.

At a TRO hearing on May 1, 1980, at the Petitioners' request, the Secretary of the United States Department of Health and Human Services was made a party defendant to the proceedings. Oral argument was scheduled for December 19, 1980, but on December 12 Congress enacted P. L. 96-611, the "Boren-Long Amendment". 42 U.S.C. Section 1396a(j). Section 5 of this new law established a new, nationwide transfer of assets rule for SSI applicants and, for the first time, authorized state Medicaid programs to apply similar rules to Medicaid applicants.

After discovery and extensive briefing of the legal issues concerning both the pre-1981 transfer rule and the new rule promulgated by the state pursuant to P.L. 96-611, the District Court issued its Opinion in April of 1982. Respondents accept Petitioners' summary of the District Court and Court of Appeals decisisions as set forth in their Petition, pp. 4-7. Respondents take strong exception, however, to Petitioners' assertion that their evidence regarding the cost of the relief ordered by the District Court was "uncontradicted." Petition, p. 6. See part III B of this Brief, infra.

II. SUMMARY OF ARGUMENT

On July 1, 1981, the federal "Boren-Long Amendment" took effect, authorizing states for the first time to use transfer-of-assets eligibility rules in their Medicaid programs. Prior to that date these rules were illegal for two reasons. Firstly, they were not authorized by the Social Security Act. Under principles announced by this Court in King v. Smith and other cases, states were therefore prohibited from enacting such rules if they violated federal eligibility provisions. Secondly, the effect of such rules was to presume that resources were

available to recipients to pay for medical care, when in fact such resources were not in any way "available." Therefore these rules violated the concept of availability contained in the Social Security Act.

Every federal court which has squarely considered the legality of these rules in "209(b)" states such as Virginia prior to 1981 has held them to be violative of the availability concept and therefore illegal. There is no meaningful "conflict" among the Circuits, because the Seventh Circuit in Synegael v. Ling was concerned only with the legality of Indiana's tranfer rule after July 1, 1981. It did not have argued to it, nor did it consider, the legality of the rule prior to that date. In addition, this Court's decision in Schweiker v. Gray Panthers requires that the availability regulations promulgated by the Secretary in 1972 be given significant deference, and that conflicting state provisions such as Virginia's transfer rule not be allowed to stand.

There is another reason why this issue is not an appropriate one for which to grant Certiorari. Given the length of time which has passed since these rules were in effect, and given the advent of the Boren-Long Amendment, it is highly unlikely that this issue will ever be before the Federal Courts again. It was a problem that required, and received, a legislative solution, and one that has lost its relevance and importance at this late date.

The notice relief ordered by the District Court and affirmed by the Court of Appeals comports with the requirements of the Eleventh Amendment, and is virtually identical to that approved by this Court in Quern v. Jordan. Petitioners' contention that the cost of relief in this case is not de minimis is without merit. Their cost figures are both vague and exaggerated, and in any event are less than 0.4% of the state Medicaid program's yearly budget. Petitioner's assertion that notice relief in this case would be "futile" seeks to introduce

issues into the case which are beyond the scope of appropriate Federal Court review in such matters.

III. ARGUMENT

A. THE LEGALITY OF VIRGINIA'S PRE-1981 TRANSFER RULE PRESENTS NO ISSUE WHICH, UNDER THE REQUIREMENTS OF RULE 17, JUSTIFIES GRANTING A WRIT OF CERTIORARI

1. Every Federal Court which has directly considered the issue has ruled that prior to July 1, 1981, Federal Law prohibited Medicaid programs in 209(b) states from having a transfer-of-assets eligibility provision.

The issue before this Court concerning the legality of the Virginia Medicaid Program's pre-1981 transfer-of-assets eligibility rule is simply this:

> Was the rule used by Virginia prior to July 1, 1981, illegal because it conflicted with the availability concept contained in the Social Security Act, 42 U.S.C. Section 1396a(a)(17)(B), and its implementing regulation, 45 C.F.R. Section 248.21(a)(2)(i) [1972]?

Every federal court which has directly confronted this issue in a 209(b)[1] state such as Virginia has reached the same conclusion: prior to the effective date of the Boren-Long Amendment[2] such rules were illegal, because they violated the concept of availability. Buckner v. Weber, 424 F. Supp. 366 (D. Conn, 1976), aff'd sub 434 U.S. 898 (1977); Udine v. Walsh, 440

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1. Pub. L. No. 92-602, Section 209(b), codified as 42 U.S.C. Section 1396a(f)

2. Pub. L. No. 96-611, codified as 42 U.S.C. Section 1396a(j), repealed in 1982 by Pub. L. 97-248, Section 132(b), and reenacted as 42 U.S.C. Section 1396p(c).

F. Supp. 1151 (E.D. Mo. 1977); Woodard v. St. Clair, CCH Medicare & Medicaid Guide Para. 30,804 (S.D. Miss. 1980); Dokos v. Miller, 517 F. Supp. 1039 (N.D. Ill. 1981); and Randall v. Lukhard, 536 F. Supp. 723 (W.D. Va. 1982) (Petition, App. p. 51-89), affd 709 F.2d 257 (4th Cir. 1983) (Petition, App. pp. 1-35), affd en banc, No. 82-1773, slip op (4th Cir. March 12, 1984) (Petition, App. pp. 36-49).

This unanimity of opinion is based upon three underlying principles. The first is the dominant role of the federal statutes in defining eligibility for Medicaid. The second is the nature of the availability concept itself. The third is the concept that if a Medicaid eligibility rule was illegal in 1972, its illegality was not affected by a state's opting in 1974 for 209(b) status. A brief discussion of these principles follows.

Since 1968, a fundamental principle of eligibility for both AFDC and Medicaid has been that a state cannot have an eligibility provision which excludes persons otherwise eligible under federal law unless such a provision is clearly authorized by the Social Security Act. This principle grew out of the case of King v. Smith, 392 U.S. 309 (1968).

In King, this Court was asked to interpret part of the Social Security Act governing eligibility for the AFDC program, 42 U.S.C. Section 602(a)(10). That provision required that state AFDC plans must provide "that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals." This Court ruled that:

> "at least in the absence of Congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause." [Emphasis added] Townsend v. Swank, 404 U.S. 282, 284 (1971).

This principle applies, the Court added, even if the Secretary's regulations "seem to imply that States may to some extent vary eligibility requirements from federal standards." Id. The principle enunciated in King applies with equal force to state Medicaid programs, because the Medicaid eligibility provisions of the Social Security Act contain language identical to the AFDC language interpreted by this Court in King. 42 U.S.C. Section 1396a(a)(8).

In an effort to avoid the ramifications of King, Petitioners have cited New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973), and Lavine v. Milne, 424 U.S. 577 (1976), for the proposition that "a state may promulgate additional eligibility criteria in social welfare programs." Petition, p. 9. As pointed out by the panel decision of the Fourth Circuit, however, neither of those cases deals with the situation in this case, where the state provision contradicts a federal eligibility provision. Randall v. Lukhard, 709 F.2d 257, 264 (4th Cir. 1983) (Petition, App. p. 33, f.n. 12).

In Dublino, this Court upheld a state rule requiring acceptance of employment as a condition to receiving AFDC. Noting that the state rule did not contradict any federal eligibility provision, this Court went on to say that:

> "so long as the state actions [as to the AFDC program] are not in violation of any specific provision of the Constitution or the Social Security Act, the Courts may not void them. . . if there is a [federal-state] conflict of substance as to eligibility provisions, the federal law must of course control. . ." [citations omitted] 413 U.S. at 423, n. 29.

In Lavine, this Court upheld a state rule prohibiting welfare payments to persons who quit their employment. In that case, as noted by the Fourth Circuit, "there was no federal provision involved at all, as the benefits were purely a matter of state law." Randall v. Lukhard, 709 F.2d at 264 (Petition, App. p. 33, f.n. 12).

The second principle underlying Medicaid transfer-of-assets litigation is that of availability. Since the very

beginning of the program, this concept has been one of the cornerstones of eligibility for Medicaid benefits.

The provisions of the Social Security Act dealing with eligibility for Medicaid were codified in 1965 at 42 U.S.C. Section 1396a *et seq.* Among other requirements, these provisions required each state Medicaid program to include "reasonable standards" which:

> "(B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient and. . . as would not be disregarded. . . in determining his eligibility for such aid, assistance, or benefits. . ." 42 U.S.C. Section 1396a(a)(17)(B).

The legislative history for this provision shows that it was Congress's intent that the requirement of "availability" be given a broad interpretation and that its common sense meaning be given effect:

> "Another provision is included that requires States to take into account only such income and resources as (determined by the Secretary) are ***actually available*** to the applicant or recipient. . . in determining the eligibility for and the amount of the aid or assistance. . . Income and resources taken into account, furthermore, must be reasonably evaluated by the States. ***These provisions are designed so that States will not assume the availability of income which may not, in fact, be available or overevaluate income and resources which are available.***" [Emphasis added] S. Report No. 404, 89th Cong., 1st Sess. 74, 78 (1965); H. R. Rep. No. 213, 89th Cong. 1st Sess. 64, 67 (1965).

The Secretary implemented Section 1396a(a)(17)(B) in regulations which required that states consider "only such income and resources as are actually available." 45 C.F.R. Section 248.21(a)(2)(i) (1972), later recodified at 45 C.F.R. Section 248.3(b)(1)(1976) and 42 C.F.R. Section 448.3(b)(1).

This concept of availability for Section 1396a(a)(17)(B) was not developed in a statutory or case-law vacuum. Sections 402(a)(7) [APDC Program] and 1602(a)(14) [Aid to Aged, Blind, and Disabled Program] of the Social Security Act,

42 U.S.C. Sections 602(a)(7) and 1382(a)(14), for example, contained similar provisions. HEW's regulations implementing these provisions for both cash programs required that:

> "in establishing financial eligibility and the amount of the assistance payment . . . (c) only such net income as is actually available for current use on a regular basis will be considered, and only currently resources will be considered. . . ." 45 C.F.R. Section 233.20(a)(3)(ii)(c) [1973].

HEW's interpretation of these statutory provisions was approved by this Court. E.g., King v. Smith, 392 U.S. 309 (1968) [children could not be denied benefits solely on the basis of assumed income from men who neither supported them nor had a legal obligation to do so].[3] The Court noted in King that:

> "Regulations of HEW, which clearly comport with the statute, restrict the resources which are to be taken into account under Section 602 to those 'that are, in fact, available to an applicant or recipient for current use on a regular basis'. . . ." [Emphasis added] 392 U.S. at 319 n. 16.

Transfer of asset rules such as those used by the Virginia Medicaid program were classic examples of a rule that presumed the availability of resources to cover medical expenses when, in fact, those resources were no longer available to the applicant.[4] It was thus inevitable that these rules would be

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3. See also Van Lare v. Hurley, 421 U.S. 338 (1975) [nonpaying lodgers of AFDC families cannot be presumed to be helping with shelter costs]; Carleson v. Remillard, 406 U.S. 598 (1972) [children of absent members of the armed forces cannot be presumed to be receiving income]; Green v. Barnes, 485 F.2d 242 (10th Cir. 1973) [only owner's equity, not market value, can be counted].

4. There has never been any doubt that these rules are penalizing recipients for the value of these resources. When Congress enacted the Boren-Long Amendment, for example, the period of ineligibility was, in certain instances, tied directly to the value of the transferred resources. P.L. 96-611, Section 5, codified at 42 U.S.C. Section 1396a(j). See also Virginia Medicaid Manual, Section 301.1 D 3, 1st para. and Section d (Appendix, pp.1-2); P.L. 97-248, Section 132(b), codified at 42 U.S.C. Section 1396p(c).

contested on the grounds that they violated the availability concept. Where the rules were contested, the Federal Courts uniformly held that they must fall before the clear mandate of the availability provisions. For example, the Fourth Circuit stated in Randall v. Lukhard, 709 F.2d at 263-264 (Petition, App. p. 8):

> ". . . Virginia's former rule violated this plain language by including resources no longer 'actually available' to the applicant or recipient. It is apparent that resources that were previously irrevocably transferred to another person, regardless of the amount of compensation received, simply are no longer actually available."

See also Dokos v. Miller, 517 F. Supp. 1039, 1044 (N.D. Ill. 1981) ["the Federal provisions leave no room for recasting as 'actually available' any assets that the recipient or applicant has in fact relinquished."]

The third principle underlying these court decisions is a common-sense corollary to the availability concept: if a state Medicaid eligibility rule was illegal before the advent of the SSI program before the state opted for 209(b) status, it continued to be illegal after the change. It was not the intent of either the SSI program or 209(b) status to grandfather-in illegal eligibility provisions. This was the conclusion reached by all four Circuit Courts of Appeal that have dealt with the issue. Norman v. St. Clair, 610 F.2d 1228, 1235 (5th Cir. 1980), cert. denied, 453 U.S. 922(1981); Randall v. Lukhard, 709 F.2d 257, 264 (4th Cir. 1983) (Petition, App., p. 9); Winter v. Miller, 676 F.2d 276, 278 (7th Cir. 1982); Gray Panthers v. Administrator, 629 F.2d 180, 185 (D.C. Cir. 1980), rev'd on other grounds sub nom. Schweiker v. Gray Panthers, 453 U.S. 34 (1981).

These three principles have provided the courts with the basic framework within which Medicaid transfer-of-assets rules in 209(b) states must be judged. Using these three fundamental concepts, the Courts have been able to pierce the semantics and threadbare legislative history surrounding the

rules, and to focus on the intent of the federal eligibility provisions and the effect of the rules themselves. The uniform result has been the invalidation of these pre-1981 rules.

2. There Is No Meaningful Conflict Among The Circuits On This Issue.

The Petitioners, however, point to the case of Syposael v. Ling, 691 F.2d 1213 (7th Cir. 1982), reh. denied January 20, 1983, cert. denied, ____U.S.____, 103 S.Ct. 3092 (1983), and claim that "the circuits are in conflict as to the statutory issue of whether a 209(b) state could have a transfer-of-assets rule prior to 1981." Petition, p. 8. A review of that decision, however, makes it obvious that this issue was never presented to the Seventh Circuit.

The only issue which was considered by the appellate panel in that case was the legality of Indiana's transfer-of-assets rule after July 1, 1981, the effective date of the Boren-Long Amendment. To use the Court's own words:

> "The regulation thus has two parts: a five-year 'reach-back' provision, and a formula for determining the period of ineligibility if an improper transfer is found. Both parts are challenged in this appeal as contrary to the Boren-Long amendment, which is section 5(a) and (b) of Pub. L. 96-611, 94 Stat. 3567 (Dec. 28, 1980)." [Emphasis added] 691 F.2d at 121 .

The reason why the Syposael court never considered the legality of the transfer rule prior to 1981 is simple: that issue was not raised or contested by the parties. Again, in the Court's own words:

> "The parties agree that under the Indiana Medicaid plan in force on January 1, 1972, applicants who had transferred assets at any time within the preceding five years either for the purpose or with the effect of establishing eligibility for Medicaid were ineligible by virtue of Ind. Code Section 12-1-5-1(f), 12-1-7-14.9." Id.

Nowhere in the Court's opinion is there any mention of the concept of availability, of 42 U.S.C. Section 1396a(a)(17)(B), or of 45 C.F.R. Section 248.21(a)(2)(i). Nowhere does the Court focus on the legality of the rule prior to the passage of Boren-Long. Nowhere in any of the briefs submitted by the parties to the Court were these issues argued or even discussed. Because the issue was not raised by the parties, the Court merely took the legality of the rule before 1981 as a given, and began its analysis at that point.

In **Randall**, on the other hand, the issue of pre-1981 legality was the primary focus of both the District Court and the Circuit Court opinions. 536 F. Supp. at 729-31 (Petition, App. pp. 56-60); 709 F.2d at 263-66 (Petition, App. pp. 7-11). Because the Seventh Circuit "simply accepted the agreement of the parties," and because it "did not have argued to it, nor did it analyze," these crucial issues, the Fourth Circuit declined to follow **Synesael**. **Randall v. Lukhard**, 709 F.2d at 265-66 (Petition, App. p. 11).

3. Schweiker v. Gray Panthers and the Deference Due the Secretary's Regulations Require the Result Reached by the Court Below.

There are two other matters raised by the Petitioners for which some clarification is required. The first is the case of **Schweiker v. Gray Panthers**, 453 U.S. 34 (1981). In **Gray Panthers** this Court held that the Secretary's regulations interpreting 42 U.S.C. Section 1396a(a)(17) must be accorded great deference, even "legislative effect." 453 U.S. at 44. Both the District Court and the Court of Appeals in this case read **Gray Panthers** as requiring them to strike down Virginia's transfer rule as violative of the Secretary's 1972 availability regulation. **Randall v. Lukhard**, 536 F. Supp. at 730-31 (Petition, App. pp. 58-59), 709 F.2d at 264 (Petition, App. p. 8).

Petitioners, however, cite this case for two propositions: firstly, that this Court has held that the concept of availability under Section 1396a(a)(17) does not mean that resources need to be actually in hand, and, secondly, that courts should be particularly deferential to the federal secretary's interpretation of this provision of federal law. Petition, pp. 9-10.

To cite **Gray Panthers** in that fashion is to take the decision totally out of context. This Court made it clear in its opinion that availability has a special meaning when dealing with the eligibility of spouses, because the federal statute makes an exception to the requirement of availability in such instances.

> "It is clear beyond doubt that Congress was wary of imputing the income of others to a Medicaid applicant. Yet, as we noted above, Congress treated spouses differently from most other relatives by explicitly authorizing state plans to 'take into account the financial responsibility' of the spouse. 42 U.S.C. Section 1396a(a)(17)(D). Congress thus demonstrated that 'deeming' is not antithetical to the general statutory requirement that Medicaid eligibility be based solely on resources 'available' to the applicant. 'Available' resources are different from those **in hand**. We think that the requirement of availability refers to resources left to a **couple** after the spouse has deducted a sum on which to live." 453 U.S. at 47-48. [emphasis in the original]

Unlike deeming, which the federal Medicaid eligibility provisions clearly authorize as an exception to the availability concept, there is no such exception in the Medicaid statute authorizing transfer-of-assets rules. Therefore, the Fourth Circuit reasoned, the latter were not authorized by federal law, and were illegal before 1981. **Randall v. Lukhard**, 709 F.2d at 264 (Petition, App. p. 8).

As to the deference due the Secretary, this Court in **Gray Panthers** was clearly referring to the deference due the **regulations** promulgated by the Secretary to implement 42 U.S.C. Section 1396a(a)(17):

> ". . . the Secretary's definition of the term 'available' is 'entitled to more than mere deference or weight,' . . . [it] is entitled

> to 'legislative effect'. . . our task is the limited one of ensuring that the Secretary did not 'exceed his statutory authority' and that the regulation is not arbitrary or capricious." 453 U.S. 34, 44 (1981).

In Gray Panthers, this Court was asked to uphold a federal regulation promulgated by the Secretary; in this case, the Court is being asked to uphold a state regulation which directly contradicts a federal regulation promulgated by the Secretary. 45 C.F.R. Section 248.21(a)(2)(i) [1972].

Regarding the deference due the Secretary's support of Virginia's position in this case, there are two salient points. The Secretary has been a defendant in this case since 1980. Indeed, one of the first acts taken by the state defendants was to joint the Secretary as a co-defendant. The Secretary's interest in having Virginia's pre-1981 tranfser rule declared legal is substantial. A contrary holding means that for some fifteen years, the Department negligently allowed the state to disqualify hundreds of applicants on the basis of an illegal eligibility criterion.

In addition, the Secretary and the Department have significantly altered their position regarding transfer rules since the filing of this case. Only in August of 1980, some four months after this case was filed, did HHS determine that such rules were not, as it had previously held, "a form of financial eligibility criterion." Memorandum from Howard Newman, Administrator, HCFA, to Regional Administrators, August 13, 1980. Appendix, p. 3. When an agency reverses its position, the deference which it is otherwise due is severely undercut: "The weight of an administrative interpretation will depend, among other things, upon 'its consistency with earlier and later pronouncements' of an agency." Morton v. Ruiz, 415 U.S. 199, 237 (1974) [citations omitted].

The second matter which requires clarification regards Judge Russell's contention, in his dissent, that Congress implicitly sanctioned the Secretary's approval of transfer rules

such as that used by Virginia. Randall v. Lukhard, 709 F.2d at 273 (Petition, App. p. 25). An "implicit sanctioning" is a very dangerous and ambiguous concept, especially in an area as labyrinthine as Medicaid eligibility. Suffice it to say that when Senator Russell Long took to the floor of the Senate in support of his Boren-Long Amendment, which would for the first time allow the states to legally impose a transfer rule in determining eligibility for Medicaid, he candidly admitted that the rules were not then legal, and needed this change in the law to become legal.

> "In recent years a number of States have uncovered an abusive practice in which certain individuals transfer substantial assets to their families or to others in order to bring themselves down to the welfare eligibility level which will qualify them for payments under the supplemental security income (SSI) program and for full paid medical care under the Medicaid program. Unfortunately, the present law is so written as to make this subterfuge possible." [Emphasis added] 126 Cong. Rec. S. 16,505 (daily ed. Dec. 13, 1980).

See also the dissent of Judge Decker in Syposael v. Ling, 691 F.2d at 1213, 1217-20 (7th Cir. 1983).

In summary, then, the issue before this Court is not whether transfer-of-assets rules "should" have been allowed before 1981, or whether it would have been "better" if Congress had authorized them in the original Medicaid statutory framework. The fact is that such rules were not authorized by federal statute before passage of the Boren-Long Amendment. The doctrine of availability and this Court's holding in King v. Smith mean that, absent such authorization, 209(b) states such as Virginia were not free to adopt such rules. If such an omission prior to 1981 was, as characterized by the District Court, a "loophole", it was a legislative one, to be corrected by Congress. As the District Court succinctly stated:

> "In light of the Gray Panthers decision, however, the Court cannot disregard the Secretary's [availability] regulations and impose a judicial solution. Congress should provide a remedy, and indeed it has by enacting the Boren-Long Amendment." 536 F. Supp. at 731. (Petition, App. p. 59-60).

Both this Court and the Fourth Circuit have recognized that in the area of federal-state benefit programs, judicial sympathy for the stated aims of a state program must give way to federal eligibility standards:

> "While we sympathize with [the State's] desire to restrict its medical assistance benefits to those most in need, 'a State's interest in preserving the fiscal integrity of its welfare program may not be protected by the device of adopting eligibility requirements restricting the class of [individuals] made eligible by federal standards.' Townsend v. Swank, 404 U.S. 282, 291 (1971)." Fabula v. Buck, 598 F.2d 869, 873 (4th Cir. 1979); Randall v. Lukhard, 709 F.2d 257, 266, f.n. 15 (4th Cir. 1983) (Petition, App. p. 34).

One final factor weighs heavily against the Court's granting Certiorari in this case. Leaving aside for the moment the fact that all Federal Courts which have directly dealt with this issue have reached the same conclusion as the Fourth Circuit, and that only one Circuit Court of Appeals has squarely faced this issue, an additional reality remains. The issue of legality of pre-1981 transfer rules in 209(b) Medicaid states is, for all intents and purposes, a "dead issue." To the best of Respondents' knowledge, there are no other cases pending in any Federal Court dealing with this issue. Given the fact that it is now more than three years since the effective date of the Boren-Long Amendment and the state transfer rules promulgated pursuant to the Amendment, it is inconceivable that any new cases would arise at this point. Given this reality, and given the lack of any meaningful "conflict" among the circuits, the requirements of Rule 17 have not been met for this issue.

B. THE NOTICE RELIEF ORDERED COMPORTS WITH THE REQUIREMENTS OF THE ELEVENTH AMENDMENT AND QUERN V. JORDAN.

The relief ordered by the District Court in this case is set out in the Petition at pages 76-80 of the Appendix. To summarize the Court's order, it consisted of the following elements: (1) an injunction against state officials denying Medicaid to members of two of the Plaintiff (Respondent) classes solely on the basis of the transfer-of-assets rule; (2) the opportunity for certain named Plaintiffs (Respondents) to be reinstated, to seek reimbursement for covered expenses, and to have access to the administrative process if any dispute arose; (3) identification and reinstatement of class members to Medicaid if they are otherwise eligible; (4) notice to class members of eligibility for possible reimbursement of covered medical expenses; and (5) notice to health care facilities of the Court's decision.

The Court of Appeals made only one change in the District Court's order. It instructed the trial court to change the wording of the notice that would be sent to class members to clarify that Virginia's Department of Welfare was not "obligated" to make redeterminations of past eligibility, etc. 709 F.2d at 270 (Petition, App. p. 21). Rather, the notice should simply explain the court's ruling, advise that the case was at an end, and notify class members that they "will have to look to state administrative or judicial remedies, if any, for possible retroactive reimbursement." Id.

In response to the assertions made by the Petitioners regarding the propriety of the relief ordered below, Respondents would like to make five points.

Firstly, the role of an appellate court in this situation is simply to determine whether the District Court has abused its discretion under its equity jurisdiction. E.g., Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15

(1971). The Ninth Circuit, for example, recently concluded, in precisely the same situation as this case (invalidation of a pre-Boren-Long transfer rule), that:

> "It was within the court's discretion, after considering the issues of cost and adminstrative burden raised by the state, to conclude that individual notice was the method best calculated to reach this class of aged, blind, and disabled persons." Beltran v. Myers, 701 F.2d 91, 94 (9th Cir. 1983), cert. denied sub nom. Bank v. Beltran, ___U.S.___, 103 S.Ct. 3115 (1983).

The relief proposed to the District Court by counsel for Respondents in this case, and adopted in large measure by the Court, was closely modeled after the relief ordered in Beltran. CCH Medicare and Medicaid Guide Para. 31,835 (C.D. Cal. 1982). There has been no abuse of discretion in either case.

Secondly, the relief ordered in this case is almost identical to the individual notice relief unanimously approved by this Court in Quern v. Jordan, 440 U.S. 332 (1979). In that case the Court described the issue as follows:

> "The issue now before us is whether that same federal court may, consistent with the Eleventh Amendment, order those state officials to send a mere explanatory notice to members of the plaintiff class advising them that there are state administrative procedures available by which they may receive a determination of whether they are entitled to past welfare benefits." 440 U.S. at 334.

All nine justices agreed that the answer to the question was "yes." Id.

This Court in Quern rejected the state defendants' arguments that the giving of the proposed notice would "lead inexorably to the payment of state funds for retroactive benefits" and therefore amount to a monetary award. 440 U.S. at 347. It explained that the chain of causation contained many missing links which could only be supplied by the state and the members of the class. 440 U.S. at 347-48. The Court noted that the notice was more properly viewed as ancillary to the prospective relief already ordered by the Court. 440 U.S. at 349. All of those considerations are present in this case to the

same extent as in Quern; both the District Court and the Court of Appeals were careful to tailor the notice to conform to these Eleventh Amendment requirements.

Thirdly, Petitioners argued that notice relief was "futile" because the class members would not be successful in seeking past benefits from the state administrative or judicial process. Petition, p. 14 f.n. 10. As explained by this Court in Quern, Petitioners' concerns in this regard are not appropriate concerns for the Federal Courts. 440 U.S. at 374-348. The eventual success of class mambers in obtaining relief is a matter which rests "entirely with the State, its agencies, courts, and legislature, not with the federal court." 440 U.S. at 348.

Fourthly, Petitioners' figures regarding the cost of complying with the District Court's order are unacceptably vague and greatly exaggerated. For example, in Ms. Cook's affidavit (Petition, App. pp. 117-120), the cost of mailing to class members would be "thousands of dollars," Petition, p. 11, and the expense of reconstructing eligibility criteria would be "significant." Petition, p. 12.

When Petitioners do come forth with concrete figures, they are inexplicably overstated. For example, in Ms. Cook's affidavit, she arrives at a cost of $375,000 per year, or $1,500,000 for four years, to prepare and research claims for payments. She bases this figure on her assumption that 1,000 people would respond to the notice, of whom 500 "would have a claim for each of the 4 years in question." Petition, App. p. 119. Since each person's disqualification period under the old transfer rule was only one year, Respondents are at a loss as to how Ms. Cook justifies her quadrupling of the total number of claims. The Petitioners' figure of $1,500,000 should thus actually be only $375,000.

In addition, the experience in Maryland suggests that the figure upon which Ms. Cook bases her other assumptions--that 1,000 people will respond to the notice--is far too high. In

Fabula v. Buck, 598 F.2d 869 (4th Cir. 1979), the Fourth Circuit invalidated Maryland's transfer rule. The state went to considerable lengths to carry out the individual notice relief ordered by the Court. According to the Maryland Attorney General's office, the Medicaid program there had estimated during the transfer-of-assets litigation that some 2,120 out of the 24,570 applications denied annually were due to the transfer rule. Letter from Assistant Attorney General David F. Chavkin to Counsel for Respondents, June 22, 1982. Appendix, pp. 4-5. A subsequent file review indicated that only sixty-three persons had been denied for such transfers during the three years in question. Id. And, despite widespread publicity of the Court's decision invalidating the rule, less than fifty hearings were ever requested by class members. Id. Respondents assert that the same numerical realities probably exist in this case, especially given the lapse of time--now over four years--since the filing of the case.

Lastly, even if this Court does accept the figures of the Petitioners as to the cost of complying with the order, they are still de minimis under any definition this Court might apply. Giving the Petitioners every conceivable benefit of the doubt, their figures appear to total less than $2,000,000. That figure comprises only 0.37%--less than four-tenths of a percent--of the Virginia Medicaid program's 1984-85 budget of $540,819,875.00. Acts of the 1984 Virginia General Assembly, Chapter 755, Item 395. In Milliken v. Bradley, 433 U.S. 267, 289 (1977), this Court held that Federal Courts are allowed to enjoin state officials to conform their conduct to requirements of federal law "notwithstanding a direct and substantial impact on the state treasury." The "ancillary cost" approved by the Court in

Milliken amounted to six million dollars. Hutto v. Finney, 437 U.S. 678, 690 f.n. 15 (1978).

If this Court finds it necessary at some juncture to clarify Quern or the concept of "de minimis cost," this case would seem a very poor vehicle for the task. The relief ordered was virtually identical to that in Quern, and the cost figures put forth by the Petitioners are vague, exaggerated, and at most a miniscule fraction of the program's budget, much less the state's budget. [5]

IV. CONCLUSION

Petitioners have raised no issues which, under Rule 17 of the Rules of this Court, would justify the grant of a Writ of Certiorari. Five District Courts and One Court of Appeal have squarely faced the issue of whether pre-1981 Medicaid transfer-of-assets rules in 209(b) states violated the availability concept; none have reached the conclusion advocated by the Petitioners. The result reached by these Courts was required by this Court's decisions in King v. Smith and Schweiker v. Gray Panthers. In addition, there is no real "conflict" among the Circuits because only the Fourth Circuit had argued to it and directly considered the issue. Given the advent of the Boren-Long Amendment and the reality that this issue will in all probability never again find its way into a Federal Court, it is no longer either important or relevant enough to justify this Court's time.

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5. In a case in which this Court recently denied Certiorari, the Fifth Circuit, citing Hutto v. Finney, 437 U.S. 678, 692 n. 18 (1978), ruled that before a cost of this sort becomes an Eleventh Amendment concern, it must be so great as to interfere not just with the budget of a single agency, but with the state's entire budgeting process. Silva v. Worrall, 621 F.2d 640, 652-53 (5th Cir. 1980), cert. denied, ____U.S.____, 101 S.Ct. 941 (1981).

In terms of the propriety of the relief granted in this case, it is virtually the same as that already approved by this Court in Quern v. Jordan. If the Court does feel it necessary at some point to clarify the concept of de minimis cost, surely a case with vague and exaggerated costs which nevertheless total only 0.4% of a state program's budget is not the proper vehicle.

For these reasons, Respondents request that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

EVELYN RANDALL, et al.

By: Herbert L. Beskin
Counsel

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Counsel for Respondents

V. AFFIDAVIT OF FILING AND SERVICE

STATE OF VIRGINIA

COUNTY OF ALBEMARLE, to-wit:

HERBERT L. BESKIN, being first duly sworn, deposes and says:

1. I am counsel of record in this case for the Respondents, EVELYN RANDALL, et al., and a member 2 of the Bar of this Court.

2. On July 6, 1984, pursuant to Supreme Court Rule 28.2, I caused to be mailed, first class, postage prepaid, at the United States Post Office, Seminole Trail, Charlottesville, Virginia 22901, addressed to The Honorable Alexander L. Stevas, Clerk, Supreme Court of the United States, One First Street, N.E., Washington, D.C. 20543, the original and ten copies of (a) the attached Brief in Opposition to Petition for Writ of Certiorari, and (b) Motion for Leave to Proceed in Forma Pauperis, with accompanying affidavits.

3. On July 6, 1984, pursuant to Supreme Court Rule 28.5, I also caused to be mailed, first class, postage prepaid, at the same Post Office, a copy of (a) the attached Brief in Opposition for Writ of Ceriorari, and (b) Motion for Leave to Proceed in Forma Pauperis with accompanying affidavits, to each of the following persons:

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Counsel for Amicus Curiae
Secretary of the U.S. Dept.
of Health and Human Services

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed this 6 day of July, 1984, at Charlottesville, Virginia.

Herbert L. Beskin
Herbert L. Beskin

The foregoing instrument was subscribed and sworn to before me, a Notary Public in and for the State and County aforesaid, on this 6th day of July, 1984, by Herbert L. Beskin.

U. Grace Bert
Notary Public

My commission expires: August 23, 1987

Property Transfer - Any applicant for medicaid benefits is ineligible for a specified period of time if he/she improperly transfers or otherwise disposes of his/her legal or equitable interest in real or personal property without adequate compensation within two years prior to application for assistance. A recipient of medicaid benefits is ineligible for a specified period of time if he/she improperly transfers or otherwise disposes of his/her legal or equitable interest in real or personal property within two years of the discovery of that transfer. Such a transfer of property will result in the ineligibility of the assistance unit for two years from the date of transfer if the uncompensated value was $12,000 or less. The period of ineligibility will be increased two months for every $1,000 or part thereof of uncompensated value in excess of $12,000. The amount of the uncompensated value is the fair market value of the property, or the client's interest in the property, established for local tax purposes, less the amount of any compensation received for the property. Exceptions to this provision occur when:

a. A transfer of property was not made in an effort to become or remain eligible for medicaid or SSI. It will be the responsibility of the client to establish that such a transfer was not made in an effort to qualify for medicaid or SSI. The client must provide objective evidence that the transfer was exclusively for another purpose. A subjective statement of intent or ignorance of the property transfer provision is not sufficient. The client must provide evidence that other resources were available, at the time of transfer, to meet current and expected needs of that client, including cost of nursing home care.

b. Retention of the property would have no effect on eligibility unless the property is a residence of an individual in a nursing home for a temporary period.

c. When the transfer of property resulted in compensation to the client which approimxates the equity value of the property. This compensation can be in the form of money, goods or services. The value of goods and services must be reasonable for the community. The value of services provided by a member of the immediate family must be a reasonable rate established prior to receipt of the services.

d. When payment has been made on the cost of medical care which approximates the equity value of the property.

e. Disposition was the result of actions by another person, except a legal guardian or committee, who for any reason obtained the property without the client's full understanding of the action.

f. An improper transfer of property made by a caretaker-relative other than the parent will have no effect on the eligibility of the children.

EMORANDUM

HEALTH CARE FINANCING ADMINISTRATION
Office of the Administrator

Appendix . 3 -

: Regional Administrators DATE: AUG 13 1980 :

Howard Newman, Administrator
: Health Care Financing Administration

ECT: Transfer of Assets Prohibitions (memo of December 31, 1979-Region V)--
INFORMATION

In a memo to Robert O'Connor, Director, Bureau of Program Policy, the Medicaid Director in Region V asked, "Can a 209(b) State which has imposed a transfer of assets prohibition on January 1, 1972 to aged, blind and disabled medically needy applicants but not on AFDC medically needy applicants, continue to apply such restrictions?"

As you are no doubt aware, PIQ 77-14 dated 2/11/77, stated on page 2, "...transfe of property restrictions cannot be imposed on the medically needy unless comparat restrictions are imposed on the categorically needy, nor can such restrictions be imposed selectively on one group of medically needy and not on another."

The reasoning at the time was that transfer restrictions are a form of financial eligibility criterion. Since the Social Security Act requires comparability of financial eligibility criteria for all groups of the medically needy, we thought it followed that any transfer restrictions must be comparable for all groups of the medically needy.

We have subsequently reviewed this issue very carefully with the Office of General Counsel, however, and believe that this issue can be viewed differently and more flexibly. We believe a restriction on transfer of assets can and should more properly be viewed as a criterion which, although it goes to eligibility, is not a financial criterion within the meaning of the statute. Rather, the purpose of such a restriction seems to be to deter persons from transferring assets solely to obtain Medicaid eligibility. In this respect, it can be viewed as a means of controlling abuse of the program.

Therefore, we think PIQ 77-14 is no longer a valid statement of policy insofar as it indicates that these restrictions can not be imposed selectively on one group of the medically needy and not on another. Transfer restrictions <u>can</u> be imposed on one group of the medically needy and not on another, <u>so long as</u> there is <u>comparability between the medically needy group and its corresponding</u> categorically needy group.

We have had inquiries from several States, client advocates and regions on various aspects of our policies on property transfer restrictions. We are in the process of making a thorough reexamination of these policies.

EXHIBIT A

BEST AVAILABLE COPY

STEPHEN H. SACHS
ATTORNEY GENERAL

ELEANOR M. CAREY
PAUL F. STRAIN
DEPUTY ATTORNEYS GENERAL

Appendix 4

OFFICES OF

THE ATTORNEY GENERAL

PRINCIPAL COUNSEL
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ASSISTANT ATTORNEY GENERAL

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ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF HEALTH AND MENTAL HYGIENE
300 WEST PRESTON STREET
BALTIMORE, MARYLAND 21201
AREA CODE 301-383-

June 22, 1982

Herbert L. Beskin
Charlottesville-Albemarle Legal Aid Society
420 3rd Street, N.E.
Charlottesville, Virginia 22901

Re: Fabula v. Buck

Dear Mr. Beskin:

Thank you for your letter of June 9, 1982 inquiring into the State of Maryland's implementation of the federal district court decision in the above-captioned case. I was not with the Office of the Attorney General during the period in question and therefore was not directly involved in the implementation of that decision. However, I have reviewed the Program's files for that period in order to respond to the questions raised in your letter.

Pursuant to interrogatories filed in the trial court, the local Departments of Social Services (who administer the Medicaid eligibility function in Maryland) were instructed to review all closed files to determine those persons who may have been affected by the invalid policy. That review was conducted of all cases back to December 19, 1976. That date was tied to the class definition certified by the trial judge.

I have enclosed copies of the instructions issued by the Medical Assistance Program of the Department of Health and Mental Hygiene (the single state agency) and the Income Maintenance Administration of the Department of Human Resources. That case file review was then updated to identify any persons who were denied after the initial answers to interrogatories.

Although the Medical Assistance Program had estimated during the pendency of the litigation that 2,120 out of the 24,570 applications denied annually were due to transfers of assets, the file review indicated that that estimate was grossly overstated. Only 63 persons were identified as having been denied for transfers during the three years in question. This figure does not include those persons who were denied for transfers of assets and were also denied on other grounds as well.

Those persons who were identified during the file review were individually notified of the Fabula decision and their right to file an appeal. No time limits were placed on their filing for an appeal. I have enclosed copies of the individual notices that were sent to class members.

In addition, the Program placed notices regarding the Fabula decision and the available remedies in more than 20 newspapers of general circulation in the State. I have enclosed a copy of that notice as well.

Although exact figures are not available, the total number of hearings requested pursuant to the Fabula decision probably numbered about 25 and certainly did not exceed 50. I previously sent you a copy of a representative Board of Review decision, the highest administrative tribunal in the Department of Health and Mental Hygiene.

I hope that this information adequately addresses the questions raised in your letter. The overall compliance statistics are rather sketchy and even Program staff directly involved in implementing the Fabula decision have little hard knowledge regarding the overall impact of the decision beyond that indicated herein.

Yours truly,

David F. Chavkin
Assistant Attorney General

DFC/kaa
enclosure

BEST AVAILABLE COPY